**Oakland Mall, Ltd. and Sears, Roebuck and Co. *and* Local 243, International Brotherhood of Teamsters, AFL–CIO**[1]

**Macomb Mall Associates, a Limited Partnership and Sears, Roebuck and Co. *and* Local 243, International Brotherhood of Teamsters, AFL–CIO.** Cases 7–CA–28367 and 7–CA–28446

April 12, 1995

## SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

This is the first occasion for us to consider how the Supreme Court's opinion in *Lechmere, Inc. v. NLRB*[2] affects a secondary employer's right to bar nonemployee union representatives from engaging in secondary consumer boycott handbilling on the employer's private property. The narrow issues before us are (1) whether Respondent Sears, Roebuck and Co. (Sears) violated Section 8(a)(1) of the Act by prohibiting such handbilling at the public entrances to its stores at both the Oakland and Macomb Malls, and (2) whether Respondent Macomb Mall violated Section 8(a)(1) of the Act by prohibiting such handbilling at the interior (mall) entrance to the Sears' store in Macomb Mall unless the Union first obtained a $500,000 liability insurance policy naming Macomb Mall as an additional insured party.

### I. PROCEDURAL BACKGROUND

On June 2, 1989, Administrative Law Judge Michael O. Miller issued the attached decision in this case, in which he applied the framework for analysis set forth in *Jean Country*, 291 NLRB 11 (1988), for issues involving denial of nonemployee access to employer property, and found that the Respondents had violated the Act.[3]

On August 27, 1991, the Board issued a Decision and Order in this case, *Oakland Mall I*,[4] affirming the judge's findings and conclusions. Thereafter, Respondents Sears and Macomb Mall filed petitions for review of the Board's Decision and Order in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order.

On January 27, 1992, the Supreme Court issued its opinion in *Lechmere*, holding that the Board's balancing test in *Jean Country*, as applied to the nonemployee union organizers in that case, was inconsistent with controlling Supreme Court precedent. Thereafter, the Board and Respondent Sears filed a joint motion with the court of appeals to dismiss without prejudice the Respondents' petitions for review and the Board's cross-application for enforcement, and to remand the case to the Board for reconsideration in light of *Lechmere*. The joint motion was granted, and the Board notified the parties that they could submit statements of position to the Board on the issues raised by the Board's reconsideration of the case.[5]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On reconsideration of *Oakland Mall I* in light of *Lechmere*, the statements of position of the parties, the briefs of the amici curiae, and our recent decision in *Leslie Homes, Inc.*,[6] we have decided to overrule certain of our unfair labor practice findings in *Oakland Mall I* and to dismiss those allegations against Respondents Sears and Macomb Mall.[7]

### II. FACTS

The facts are fully set out by the judge in the attached decision. They are essentially as follows.

The Union's primary dispute was with Ryder DPD, which laid off trucking employees represented by the Union after Sears canceled its contract with Ryder for home delivery services in July 1988. Sears replaced Ryder with Leaseway Trucking, which had no contract with the Union, and which hired only a few of the laid-off Ryder employees. The Union responded with a handbilling campaign directed solely at Sears' customers at the Sears' stores in the Oakland and Macomb Malls, in Troy and Roseville, Michigan, respectively. The handbillers were mostly former Ryder employees; none were employees of any of the Respondents. There were no signs carried or displayed and there was no picketing. There is no evidence that the handbillers attempted to prevent any customers from entering the stores. The handbills, which urged Sears to once again contract with Ryder so that the Union's members could regain jobs as Ryder drivers delivering for Sears, contained the following message:

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] 502 U.S. 527 (1992).

[3] Respondents Sears and Macomb Mall filed exceptions (with supporting briefs) to the judge's decision, and the General Counsel filed an answering brief. Respondent Oakland Mall did not file exceptions or a brief.

[4] 304 NLRB 832.

[5] Statements of position were submitted by the General Counsel, the Charging Party Union, and Respondents Sears and Macomb Mall. Additionally, amicus curiae briefs were submitted to the Board by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), the Chamber of Commerce of the United States of America (Chamber of Commerce), the National Retail Federation (NRF), and the Council on Labor Law Equality (COLLE).

[6] 316 NLRB 123 (1995).

[7] As noted above, Respondent Oakland Mall did not file exceptions to the judge's finding that it violated the Act. Consequently, the allegations against Respondent Oakland Mall, and the violations found on the basis of them, are not before the Board.

ATTENTION SHOPPERS

PLEASE do not shop at this . . . .
Sears & Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.

Thank You . . . .
Teamsters Local No. 243

In addition to distributing the handbills, the former Ryder employees asked customers to speak on their behalf to Sears' management.

A. *Oakland Mall*

Sears occupies Oakland Mall along with 3 other major department stores and 140 specialty shops. There is a single, wide interior entrance into Sears from inside the mall, and eight exterior entrances with double or quadruple doors from the sidewalk surrounding Sears. Sears owns its store building and surrounding sidewalks, the mall area adjacent to the mall entrance (extending 12 feet into the mall area), and a 3000-car parking lot adjacent to the store. The parking lot extends several hundred feet to paved or grass-covered public easements, about 12 to 20 feet wide, surrounding the lot, which themselves adjoin the six- and four-lane thoroughfares bordering the mall. Sixty-five percent of Sears' customers enter the Sears' parking lot through two of the five automobile entrances, and the rest of the customers use the other three entrances about equally. About 80 percent of Sears' customers enter the store through the eight exterior entrances. The rest use the interior entrance from the mall.

No-solicitation/no-distribution signs are posted at the exterior entrances, and these rules have been strictly and uniformly enforced, with the only exception being for a limited number of Salvation Army bell ringers at Christmas time.

On August 2, 1988, Union Organizer Thomas Ziembovic and about six laid-off Ryder employees began to handbill the Sears' store at the interior mall entrance and at two exterior entrances, all of which were on Sears' property. Sears' store manager, Marshall Dyke, told the two handbillers at the mall entrance that they were not allowed to handbill and that they were on Sears' property. The handbillers left the mall entrance. The handbillers at the other entrances refused Dyke's demand that they stop handbilling. Dyke called the police. At Dyke's request, the police ordered the handbillers off Sears' property. The police told them that they could handbill on the public easement around the property, but that if they obstructed traffic or refused to follow police orders, they would be arrested.[8] The handbillers did not attempt to handbill cars at the public easement, and made no further attempts to handbill Sears' customers at Oakland Mall.

B. *Macomb Mall*

Sears occupies Macomb Mall along with 1 or 2 smaller department stores and about 90 specialty shops. There is a single, relatively wide interior entrance into Sears from the mall, and about seven other exterior entrances with single, double, or quadruple doors from the sidewalk surrounding Sears. Sears owns its store building and surrounding sidewalks and a 1500-car parking lot adjacent to the store. The parking lot extends to hard-surfaced public easements, about 15 to 20 feet wide, surrounding the lot, which themselves adjoin the multilane thoroughfares bordering the mall. About 40 percent of Sears' customers enter the lot through one particular automobile entrance, and the rest of the customers use the other seven entrances about equally. About 80 percent of Sears' customers enter the store through the several exterior entrances. The rest use the interior entrance from the mall.

No-solicitation/no-distribution signs are posted at every entrance, and these rules have been strictly enforced, without exception. In addition to Sears' no-solicitation/no-distribution policy, Macomb Mall itself also had a strictly enforced policy covering solicitation, petitioning, and vending on mall property by nontenants. Under that policy, nontenant organizations wishing to engage in such activities on mall property are required to complete an application describing the proposed activity, sign both a ''Hold Harmless and Indemnification Agreement'' and an agreement to abide by the rules established for such activities, and provide the mall with a certificate of insurance (similar to that required of its commercial tenants) establishing that Macomb Mall has been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. After meeting these requirements, numerous organizations have held shows, exhibits, and fundraisers in the mall.

On August 9, 1988, the Union began to handbill at several of Sears' exterior entrances and at its interior mall entrance (which was Macomb Mall property, unlike the interior mall entrance at Oakland Mall, which was Sears' property for 12 feet into the mall area). Mall management told the handbillers at the mall entrance to stop. The handbillers refused, and continued until they ran out of handbills. The mall told the Union it would have to comply with the above-described ap-

[8] Oakland Mall itself also denied the handbillers' permission to handbill anywhere on mall property, including at the mall entrance to the Sears' store. The judge found that Oakland Mall violated the Act by doing so, and, as noted above, there were no exceptions to that finding.

plication and insurance requirements in order to be permitted to handbill on mall property. Ultimately, however, the Union was unable to obtain such insurance, and thus was never permitted to handbill on mall property.

The next day, August 10, the Union again handbilled at the mall entrance and at several exterior entrances. Sears' management told the handbillers that they were on private property and would have to leave, or Sears would call the police. The handbillers refused to leave and Sears called the police. The police ordered the handbillers to leave Sears' property, under threat of arrest. The police told the handbillers that they could handbill from the easements around the parking lot, but that if they stepped off the easements and handbilled in the street, they would be arrested for obstructing traffic. The handbillers left without attempting to handbill anywhere else. This sequence of August 10 events was essentially repeated about a month later, on September 7.

## III. THE SUPREME COURT'S OPINION IN LECHMERE

In *Lechmere, Inc. v. NLRB*,[9] the Supreme Court held that *Jean Country* impermissibly recast as a ''multifactor balancing test'' the general rule of *NLRB v. Babcock & Wilcox Co*.[10] permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. 502 U.S. at 538. *Babcock's* holding, as reaffirmed in *Lechmere*, is that Section 7 does not allow nonemployee union organizers to come onto private property *except* in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'' Id. at 537. Thus, ''[i]t is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . .'' Id. at 538 (emphasis in original).

## IV. CONTENTIONS OF THE PARTIES

The General Counsel, Respondents Sears and Macomb Mall, the Chamber of Commerce, NRF, and COLLE contend that the Court's interpretation of *Babcock* in *Lechmere* applies to the nonemployees in this case who were seeking access to the Respondents' properties to engage in consumer boycott handbilling. The General Counsel argues, however, that the Respondents' denial of access to their properties was unlawful even under the *Babcock/Lechmere* analysis because no reasonably effective alternatives existed for the Union to communicate its message to the public. The Respondents, the Chamber of Commerce, NRF, and COLLE contend, on the other hand, that the General Counsel has failed to prove a lack of reasonable alternative means.

The Union and amicus AFL–CIO argue that the *Babcock/Lechmere* analysis involved organizational activity and should not apply to protected consumer boycott activity. More specifically, the Union argues that the handbillers in this case, rather than being ''nonemployees,'' were in fact laid-off employees of Ryder, and that they were thus not within the scope of the permissible employer restrictions on nonemployee trespass addressed in *Babcock* and *Lechmere*. The Union argues further that the handbillers in this case, as ''employees'' within the meaning of the Act, were entitled to its full protection, that state law property rights of employers must yield to the extent necessary for ''full and complete operation of the rights of employees under the Act,'' that such employees are not obligated to search for other reasonable, effective ways to exercise their rights when the conduct they engaged in was completely lawful and effective, and that therefore the Board should not balance an employer's nonstatutory property interests with the statutory rights of employees.

The AFL–CIO argues that where, as here, employees covered by the Act seek to engage in protected concerted activity on the property of a person other than their own employer, the Board should either continue to apply the *Jean Country* accommodation analysis or, preferably, apply a rule of law assertedly based on the rationale of the Supreme Court's opinions in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978): i.e., that employer actions prohibiting the exercise of direct Section 7 rights on the employer's property constitute an illegal interference with those rights unless the employer has an adequate business justification for the prohibition, involving more than just the bare invocation of property rights.

## V. DISCUSSION

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee, area standards activity. After reviewing *Lechmere* and related Court precedent,[11] the Board concluded that the Court intended the *Babcock* accommodation analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployees from gaining access to its private property to engage in area standards activities. No balancing of employee and employer rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the employer's property. For the reasons fully set forth in *Leslie*, we find that

[9] 502 U.S. 527 (1992).
[10] 351 U.S. 105 (1956).
[11] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 (1978).

the *Babcock* accommodation analysis, and the general rule articulated above, also apply to the nonemployee consumer boycott activities in the instant case.[12]

We turn then to the question of whether the General Counsel has proven that the Union had no reasonable alternative means of communicating with Sears' customers.[13] In *Lechmere*, the Court stated that the *Babcock* exception requiring access to private property by nonemployee organizers applied only in rare situations where a union confronts ''unique obstacles'' to nontrespassory communications, as when the location of a plant and the living quarters of employees ''isolated [them] from the ordinary flow of information that characterizes our society.'' 502 U.S. at 540. The Court emphasized that the union's burden of proving the exception is a heavy one, which cannot be satisfied ''by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.'' Id.

In accordance with that approach dictated by the Court, we need not exhaustively analyze the feasibility of every conceivable means by which a union might communicate its message to an audience, so long as there is at least one possible means, and the General Counsel has put on no evidence at all that that means is not feasible. We therefore do not undertake here the task of analyzing the feasibility of handbilling while standing on easements around the parking lots or on public property at the mall perimeter, because we find that the General Counsel has failed to show that various means of mass communication were not an available means of presenting the Union's message to potential customers of Sears.

In this regard, we acknowledge that in *Jean Country*, the Board noted that ''generally it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact.'' 291 NLRB at 13. However, in *Lechmere*, the Supreme Court reaffirmed *Babcock's* general rule that an employer may validly post his property against nonemployee distribution of union literature and emphasized the narrowness of the inaccessibility exception to that rule. As noted above, the Court stated that for the exception to apply the union must confront ''unique obstacles'' to nontrespassory communications, such as employees ''isolated from the ordinary flow of information that characterizes our society.'' 502 U.S. at 540.

In light of *Lechmere*, we find it necessary to reconsider the comment in *Jean Country* quoted above. Newspapers, radio, and television are certainly part of ''the ordinary flow of information that characterizes our society.'' At least where the Section 7 right is as attenuated as the one in question here,[14] we find that the General Counsel must show that the use of the mass media (such as newspapers, radio, and television) would not be a reasonable alternative means for the Union to communicate its message.

No such showing has been made in the instant case. Indeed, the scant evidence on this question establishes only that the Union did not consider mass media communication of its message. Thus, Union Organizer Thomas Ziembovic testified that the Union never attempted to use newspapers, television, radio, mass mailings, or other ''public medias'' to advertise its dispute with *Sears*. In the absence of supporting evidence, we cannot rely on ''mere conjecture'' or ''expressions of doubt'' to dismiss use of the mass media as a reasonable alternative means. Id. at 540.

Our dissenting colleague cites expense and remoteness as ''shortcomings'' in the use of mass media. As to the former, the General Counsel adduced no evidence as to the costs of using mass media. As to the latter, we assume arguendo that confrontations at a store are more effective than, for example, an advertisement in a newspaper. However, it is clear that the

[12] We therefore do not rely on the judge's assessment of the relative strengths of the property and Sec. 7 rights asserted by the parties.

We find that the handbillers are ''nonemployees'' in this context because they were neither employees of any of the employers whose property interests are at issue in this case nor employees with any rights to enter the property in the course of their employment under a subcontract. Cf. *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992) (*Republic Aviation* governs the organizing activities of cleaning subcontractor's employees which took place on private premises that were the employees' regular and exclusive worksite).

[13] As in *Leslie*, we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for nonemployee consumer boycott activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods.

We recognize that here, unlike in *Lechmere* and *Babcock*, the Union is not seeking to represent employees, but in fact already represents the former Ryder employees and is seeking to exert pressure to restore their jobs by persuading Sears to recontract with Ryder. We do not see that as a reason for not applying the general rule of *Lechmere/Babcock*. The fact remains that the Union represents no employees who have a present connection to any employer with an interest in the property or employees who have any claim to having been unlawfully terminated by such an employer. The *Lechmere/Babcock* general rule, as well as its inaccessability exception, would indisputably apply were the Union to seek to organize the employees of Leaseway, who are now performing the work formerly contracted to Ryder. But the Union has expressed no such intent. Because Sears is a neutral with respect to the labor relations of independent contractors such as Leaseway and Ryder, pressure on Sears to cease doing business with Leaseway and recontract with Ryder is secondary pressure. It would be anomalous to permit greater leeway respecting trespass for this kind of activity than for the primary activity of organizing a property owner's own employees.

[14] Like area standards handbilling, secondary consumer boycott handbilling is a less favored Sec. 7 right under the *Babcock* analysis. See, e.g., *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978); *Federated Department Stores*, 294 NLRB 650, 651–652 (1989); *Hardee's Food Systems*, 294 NLRB 642, 643 (1989), affd. sub nom. *Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990); *Best Co.*, 293 NLRB 845, 847 (1989).

broad proscription on nonemployee trespass will apply even if nontrespassory communication is ''less-than-ideally effective.'' Id. at 539.

Based on the foregoing, we find that the General Counsel has failed to carry his heavy burden of proving ''unique obstacles'' to the Union's attempt to communicate its consumer boycott message to Sears' customers. Therefore, we conclude that Respondents Sears and Macomb Mall did not act unlawfully by prohibiting, or imposing an insurance requirement on, the Union's handbilling on the Respondents' properties. Accordingly, we shall dismiss the complaint against Respondents Sears and Macomb Mall.

## CONCLUSIONS OF LAW

1. Respondent Sears has not violated Section 8(a)(1) of the Act by demanding that the Union stop handbilling on Sears' property, or by threatening the handbillers with arrest if they continued to handbill on its property.

2. Respondent Macomb Mall has not violated Section 8(a)(1) of the Act by imposing a liability insurance requirement on the Union as a condition of permitting the Union to handbill on the the mall's property.

## ORDER

The complaint is dismissed as to Respondents Sears and Macomb Malls.

MEMBER TRUESDALE, dissenting.

For the reasons set forth in Member Browning's and my joint dissent in *Loehmann's Plaza II*,[1] I would not apply the access analysis of *Lechmere, Inc. v. NLRB*[2] to this case, where employees engaged in consumer boycott handbilling. I believe that *Lechmere's* rationale is properly limited to nonemployee organizational activity on an employer's private property. I would apply a traditional access analysis and would reaffirm the Board's prior holding that Respondent Sears violated Section 8(a)(1) of the Act by prohibiting the Union's consumer boycott handbilling on its property and that Respondent Macomb Mall violated Section 8(a)(1) by imposing a liability insurance requirement as a condition of permitting the Union to conduct consumer boycott handbilling on its property.

Contrary to my colleagues, I would find that the Union had no reasonable nontrespassory means of communicating its consumer boycott message to its intended audience, Sears' customers and potential customers. The Sears' stores where the Union attempted to handbill were located in 2 enormous shopping malls containing 92 and 144 stores, respectively. The mall buildings at each location were surrounded by extensive privately owned parking areas bordered by heavily traveled thoroughfares. Given the massive size of each mall and its surrounding parking areas; the large number of stores at each mall; the distance from the bordering public thoroughfares to the Sears' stores within the malls; and the speed and volume of traffic on those thoroughfares, I would join the administrative law judge's and the Board's finding in *Oakland Mall I*[3] that handbilling at the malls' perimeters did not constitute reasonable alternative means by which the Union could communicate its message.[4] I would also agree with the Board and the judge in *Oakland Mall I* that picketing would not constitute a reasonable alternative means of communication. Sears, although ''at the fulcrum of the dispute,''[5] was technically a secondary party to the dispute, and such picketing could subject the Union to an 8(b)(4)(B) charge.

My colleagues now place an even greater burden on the Union. They would require the General Counsel to show that various means of mass communication, such as newspapers, radio, or television, did not constitute available alternative means of communication for the Union's message. Relying on *Lechmere*, they overrule Board precedent holding that ''generally it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact.''[6] I do not concur in this reversal of sound precedent.

Even if *Lechmere* were applicable to this case, I would not find that *Lechmere* compels such a result. My colleagues rely on the Court's broad reference to ''the ordinary flow of information that characterizes our society.''[7] In fact, however, the Court acknowledged but *refrained* from overruling the Board's specific finding that, because newspaper advertisements placed by the union were expensive and might not reach employees, they were not a reasonably effective alternative means of communication.[8]

Moreover, use of mass media has abundant shortcomings—expense and remoteness—that justify the Board's presumption that it does not provide a reasonable alternative means for unions to communicate with customers or potential customers of an employer. As the court of appeals recognized in *Giant Food Markets*

[1] 316 NLRB 109 (1995). See also the dissent in *Leslie Homes, Inc.*, 316 NLRB 123 (1995).

[2] 502 U.S. 527 (1992).

[3] 304 NLRB 832 (1991).

[4] The Board found that handbilling from the highway medians and left turn ''jughandles,'' the parking lot entrance medians, or the public easements between the bordering highways and the parking lots would have been fruitless and dangerous. Id. at 833 fn. 8 and accompanying text, and 841–842.

[5] Id. at 833 fn. 9 and 841.

[6] *Jean Country*, 291 NLRB 11, 13 (1988).

[7] 502 U.S. at 540.

[8] ''Whatever the merits of that conclusion,'' the Court stated, ''other alternative means of communication were readily available.'' Id.

*v. NLRB*,[9] a case concerning area standards picketing of a retail store:

> When the consumers potentially come from a large metropolitan area and cannot be categorized as a specific group patronizing a specific type of store, expensive, extensive mass media or mailer campaigns should not be required. If reasonableness is a criterion for determining whether or not an alternative means of communication exists, the union should not be forced to incur exorbitant or even heavy expenses. A mass media campaign would also diffuse the effectiveness of the communication by being physically removed from the actual location of the store whose policies are at issue and would prevent any personal contact between the union and the intended audience.[10]

Although the ordinary flow of information may indeed characterize our society, the ability to place particular information in this flow is not equally available to all. In the realm of mass media, many large corporations that sell consumer goods or services, such as automobiles, medications, or long-distance telephone service, for example, devote vast sums to extensive advertising to establish awareness of their products in the consciousness of virtually all television viewers, radio listeners, and newspaper readers. Unions, however, are not commercial enterprises and lack the means to undertake mass media advertising, at least on the scale needed to instill their message into the minds of their audience. This imbalance is so patent that I would not require unions to prove in every access case that mass media is not a reasonable alternative means of communication. Here, although the Sears' stores may effectively reach their potential customers through mass media advertising, it is folly to presume that the Union could convey its message to potential Sears' customers through similar means. Moreover, even if cost were not a barrier, it is doubtful that many broadcasting companies or newspapers would accept advertising bearing the ''do not patronize'' messages that unions often wish to convey, such as the one displayed on the handbills that the Union attempted to distribute here.

In sum, I find that the Union could not reasonably convey its message to its intended audience through handbilling or picketing from public property at the perimeters of the two shopping centers, and I dissent from my colleagues' reversal of Board precedent holding that mass media is presumptively not a feasible alternative means for a union to convey its message. I would reaffirm the Board's holding in *Oakland Mall I* that Respondent Sears violated Section 8(a)(1) by prohibiting the Union's consumer boycott handbilling on its property and that Respondent Macomb Mall violated Section 8(a)(1) by imposing a liability insurance requirement on the Union as a condition of permitting it to conduct consumer boycott handbilling on its property.

[9] 633 F.2d 18 (6th Cir. 1980), denying enf. on other grounds 241 NLRB 727 (1979).

[10] Id. at 24–25; see also *Sentry Markets*, 296 NLRB 40, 43 (1989), enfd. 914 F.2d 113, 117 (7th Cir. 1990); *Scott Hudgens*, 230 NLRB 414, 416 fn. 22 and accompanying text (1977), citing *Scott Hudgens*, 205 NLRB 628, 631 (1973).

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*Hy Bear, Assistant General Counsel*, of Chicago, Illinois, for Respondent Sears, Roebuck and Co.

## DECISION

### STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heard in Detroit, Michigan, on January 25, 26, and 27, 1989, based on unfair labor practice charges filed on August 18 and September 9, 1988, by Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), complaints issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on September 27 and October 24, 1988, and an order consolidating cases which issued on October 26, 1988. The complaints allege that Oakland Mall, Ltd., Macomb Mall Associates, a Limited Partnership, and Sears, Roebuck and Co. (individually Oakland Mall, Macomb Mall, and Sears and collectively Respondents) prohibited the Union from engaging in handbilling activities on property owned by each of them, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondents' timely filed answers denying the commission of any unfair labor practices.

All parties were afforded the opportunity to examine and cross-examine witnesses, introduce evidence, argue orally, and submit posthearing briefs. Briefs were submitted on behalf of all parties.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

### FINDINGS OF FACT

#### I. THE EMPLOYERS' BUSINESSES AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Oakland Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Troy, Michigan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Troy, Michigan place of business goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan.

[1] The unopposed motions to correct the transcript are granted.

Oakland Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Macomb Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Roseville, Michigan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Roseville, Michigan place of business goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Macomb Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sears, a New York corporation, is engaged in the retail sale and distribution of clothing, household goods, appliances, and related items at its stores which are located throughout the United States, including stores in Troy and Roseville, Michigan, the only facilities involved in the instant proceedings. In the course and conduct of its business operations at each of the Michigan stores involved herein, it annually derives gross revenues in excess of $500,000, and annually purchases and receives goods and materials valued in excess of $50,000 which were shipped directly from points located outside the State of Michigan. Sears admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondents have stipulated, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *Background—The Union's Dispute and Object*

For a number of years, Sears had a contract with Ryder DPD to provide home delivery services. Ryder's 80 to 100 employees were represented by the Union. When Sears canceled its contract with Ryder in July 1988,[2] retaining Leaseway Trucking in its place, the Ryder employees were laid off. Leaseway hired only a few of those employees and has no agreement with the Union.

In August, the Union decided to handbill the Sears' stores in the Oakland and Macomb Malls in an effort to win customer sympathy and support for its efforts to get Sears to reinstate Ryder and thereby return its members to the jobs which they had lost. The handbill, distributed on each instance described hereafter, read:

ATTENTION SHOPPERS

PLEASE do not shop at this . . . .
Sears & Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.

Thank You . . . .
Teamsters Local No. 243

In each instance, the handbillers were instructed not to roam about or prevent anyone from entering the store, to be polite, and to tell anyone who asked that they were trying to get their jobs back. There is no evidence in this record that the handbilling was conducted in any way inconsistent with these instructions. While the handbillers asked shoppers to refrain from shopping in the Sears' stores, the Union's witnesses professed to be asking customers to speak on their behalf with Sears' management. The handbillers, who were, for the most part, former Ryder employees, were given no instructions regarding their presence on, or avoidance of, private property.

The handbilling was directed solely at Sears' customers; there was no attempt to organize or otherwise reach the employees of Sears, Oakland Mall, or Macomb Mall, whether unionized or not. Neither of the malls was involved in the underlying dispute. There were no signs or sandwich boards used and there was no picketing.

### B. *Sears and Oakland Mall*

#### 1. The properties

Oakland Mall is located at the junction of 14 Mile and John R Roads in Troy, Michigan, just off of interstate 75. It is an enclosed mall, consisting of three major department stores, Sears, Penney's, and Hudsons, located at the ends of wide, streetlike aisles, complete with trees, plants, and benches. About 140 smaller specialty shops line the aisle. Sears, the largest store in the mall, was built before the mall as a freestanding store and is now joined at the mall's eastern wall. There is a single wide entrance into Sears from the inside of the mall on the ground floor. There are also approximately eight entrances, consisting of either double or quadruple doors into the various departments from the sidewalk surrounding Sears. Sears owns, provides security for, and pays taxes on its own building, the sidewalks around it, the area adjacent to the mall entrance extending 12 feet into the mall, and the parking lot adjacent to the Sears' store, extending at least several hundred feet to the public easement between the parking lot and the roads.

While there are no signs or other markings indicating the ownership or the property lines, there are no-solicitation signs at each of the Sears' entrances. Those signs, consistent with Sears' policies, read:

NOTICE TO THE PUBLIC

SOLICITATION OR DISTRIBUTION OF HANDBILLS—CIRCULARS, ETC. PROHIBITED ON THESE PREMISES WITHOUT PRIOR PERMISSION.

SEARS, ROEBUCK AND CO.

Pursuant to this policy, Sears at Oakland Mall has not permitted any solicitations, even for charitable purposes, except for a limited number of Christmas bell ringers, to be conducted on its property.

Surrounding the mall are parking lots; the portion owned and maintained by Sears has a capacity of more than 3000 cars, the portion owned and maintained by Oakland Mall has

[2] All dates hereinafter are 1988 unless otherwise specified.

space for about 8800. Abutting the parking lots are public easements, paved or grass covered, which are between 12 and 20 feet wide. Both 14 Mile and John R Roads are heavily traveled, divided thoroughfares, six and four lanes respectively, with 40-mile-per-hour speed limits.

Along 14 Mile Road, to Oakland Mall's south, there are two entrances to the parking lots. The easternmost entrance, designated entrance number one, follows the property line between Sears and the mall. It serves both lots and is used by customers going to either the mall in general or Sears in particular. It is the most convenient entrance for customers approaching Sears from 14 Mile Road. Overhead is a sign pointing to Sears with no designation of the mall or other stores on it. There does not appear to be a median strip, on either public or private property, in the center of that entrance driveway. There is a narrowing of the median strip on 14 Mile Road, referred to as a ''jughandle,'' and a traffic light to facilitate east bound traffic in crossing the west bound lane to enter the parking lot at entrance number one. To the west is an entrance to the mall parking lot, with a sign identifying Oakland Mall, Sears, and Hudsons, used by customers destined for any of the stores. At the junction of 14 Mile and John R Roads there is a pylon sign, identifying Oakland Mall, Sears, Hudsons, and Penney's.

Along John R, which runs north and south, there are five entrances to the parking lots. Four of these enter into Sears' property. Only the southern (number two) and northern (number five) entrances have median strips, small portions (8 feet) of which extend into public property. There is a traffic light at entrance number two, and a jughandle which can accommodate about 10 cars. There are also two buses which stop along John R, at entrance number two, and another which enters the parking lot and stops at the Penney's store.

Most (approximately 65 percent) automotive traffic enters the Sears' parking lots through entrance number one, along 14 Mile Road, and entrance number two, off of John R. The remainder of the traffic is fairly well distributed among the other three entrances. Sears does not prohibit persons intending to shop at other stores in the mall from using its parking lot or the entrances thereto; neither does Oakland Mall prohibit Sears' customers from using its parking lot and its entrances.

About 80 percent of Sears' customers enter that store through the exterior doors; the remainder enter from the mall. Some customers destined for other stores in the mall enter and cross through Sears. Sears contends that most of its customers are ''single item shoppers'' who come to the mall solely to shop at Sears, entering and using the parking lots nearest the Sears' department in which they intend to shop.

Sears and Oakland Mall are open for all but 3 days a year; Sears' hours are slightly longer than those of the mall stores but, when Sears is open, customers can enter the mall through the Sears' mall entrance.

### 2. Attempts to handbill Sears at Oakland Mall

On August 2, Thomas Ziembovic, an organizer for the Union together with about six laid-off Ryder employees, began handbilling at the Sears at Oakland Mall. Handbillers were stationed at the mall entrance, at the entrance from the parking lot to the women's department, and by the entrance to the service department; all were on Sears' property. At about 2 p.m., Marshall Dyke, Sears' operating manager for that store, was directed by his unit manager to determine if there were handbillers and solicitors at the store's entrances. He proceeded to the mall entrance, where he encountered two persons passing out union handbills. He told them that this activity was not allowed and that they were on Sears' property. They left, stating that they had not realized it was Sears' property.[3]

Dyke proceeded through the store to the women's department, observing handbills that customers had placed on the cash registers and end caps. He found three men handbilling at the women's department entrance and, when he told them that their conduct was not permitted, was referred to Ziembovic. He repeated his admonition to cease the distribution, referring to Sears' no-solicitation rule, and threatened to call the police if they did not leave. Ziembovic told him ''to do what he had to do'' and the handbilling continued.

About 1 or 2 hours later, the Troy police arrived. They spoke with Dyke and accompanied him to where Ziembovic and the Ryder employees were handbilling. At Dyke's request, the police ordered Ziembovic and the employees to leave Sears' property. When Ziembovic stated that they wanted to continue handbilling, the police officer replied that they could handbill at the easement around the property. However, Ziembovic was told that if they obstructed traffic or refused to follow police orders, they would be arrested.

### 3. Attempts to handbill in Oakland Mall

About midafternoon on August 2, Ziembovic, accompanied by one of the Ryder employees, went to the Oakland Mall office where he spoke with Don Pyden, mall manager. He told Pyden that the Union wanted to handbill Sears' customers at the entrance to Sears from the mall. According to Ziembovic, Pyden refused his request, stating that the Union could handbill at any of the Sears' exterior entrances, those being Sears' property, but could not handbill anywhere in the mall, including the area around the mall entrance, which, he erroneously claimed, was mall property. He allegedly threatened to call the police if the Union handbilled on the mall's private property. And, although Ziembovic did not express any interest in placing handbills on cars in the parking lots, Pyden allegedly added that the Union was not to do so because it would cause littering.

Pyden claimed to have merely said that, ''I would rather he would not . . . pass out handbills,'' denying that he had refused permission to do so and denying that he made any reference to the parking lots. Pyden testified that he had no authority over Sears' property within the mall; however, he did not tell the Union that Sears was the owner of the first 12 feet outside its mall entrance. The Union made no further effort to handbill at the mall entrance.

Some time thereafter, Ziembovic called Douglas Mossman, one of the mall's principals, and repeated his request to handbill at Sears' mall entrance. According to Ziembovic,

[3] Ziembovic testified that there was no handbilling at the mall entrance; Dyke, however, observed handbillers there and ordered them off of the property. I credit Dyke who had no reason to fabricate this testimony. With six or more employees handbilling different points around Sears, it is distinctly possible that some of them chose, on their own and without Ziembovic's knowledge, to handbill at the mall entrance. It appears, from subsequent events, that they did not tell Ziembovic of their confrontation with Dyke.

Mossman refused his request, stating that Sears owned its own property but not identifying the property line as being within the mall. He also rejected Ziembovic's query about placing handbills on cars in the parking lot, allegedly stating that he would make sure they ended up on the ground, constituting littering.

Like Pyden, Mossman claimed to have told Ziembovic that he only preferred that the Union not handbill on mall property. He further claimed to have identified the Sears' property line and to have stated that the Union could handbill on Sears' property and could distribute its handbills in the mall's parking lot as long as the handbills were not left on car windshields, where they would cause a littering problem.[4]

Notwithstanding that the General Counsel failed to call the employee who had accompanied Ziembovic to Pyden's office to corroborate Ziembovic's testimony, I am inclined to credit his recollection as against both Pyden's and Mossman's. It is not plausible that a union which was serious enough about a dispute to prepare a handbill, bring employees together to distribute it, continue its distribution on Sears' property even when ordered off, and seek permission to make that distribution on what it believed to be mall property would have refrained from doing so had it merely been told, ''We would rather you didn't.'' Given such noncommittal answers as Pyden and Mossman claimed, Ziembovic would have gone ahead with the distribution. That he refrained from doing so, in the circumstances of this case, evidences that he was ordered not to do so.

On August 10, the Union wrote both Pyden and Douglas Mossman, ''requesting permission to handbill at the Sears' entrances at the Oakland Mall.'' Neither letter was answered. Both Mossman and Pyden testified that they did not reply because they interpreted the letter to be seeking permission to handbill on Sears' property, not Oakland Mall's.

#### 4. The Union's alternatives

The Union did not return to handbill at the Oakland Mall or Sears after August 2. Neither did it attempt, on that or any other day, to distribute its handbills from the public easement around the parking lots, the public easement portion of the medians in entrances numbers two and five off of John R Road or the median strips and jughandles on 14 Mile or John R Road, areas which Respondent Sears contends are suitable for the Union's distribution.

In addition to the speed of the traffic around the mall making distributions at the roads ineffective or dangerous, Ziembovic pointed out that a person attempting to pass out literature from the easements along the adjacent roads would be on the passenger side of any passing car, making it virtually impossible to hand a leaflet to a driver even if the car slowed down and the window was open. Standing on the median in those roads, or on the jughandles, might enable a distributor to reach a driver who had slowed or stopped to turn into the mall but risked arrest for obstructing traffic, as threatened by the police. Similarly, an attempted distribution from the medians in entrances numbers two and five would have required a distributor to stand within approximately 8 feet of the public easement and would have required a driver to stop immediately on turning into the driveway in order to accept a handbill, thus risking an accident for himself and posing a risk of arrest for the distributor. Moreover, if it had attempted to make its distribution from this point, or from the medians, jughandles, and easements which were in, alongside of, or at the junction of the two roads, where charitable solicitations have taken place, the Union would not have been able to distinguish between those shoppers going to Sears and those going elsewhere.

### C. *Sears and Macomb Mall*

#### 1. The properties

Macomb Mall is located in Roseville, Michigan, bounded by Masonic Boulevard on the south, Beaconsfield on the west, and Gratiot Avenue on the east. Gratiot is a divided multilane thoroughfare, with a 35-mile-per-hour speed limit, with one entrance into Sears' parking lot just north of the junction of Gratiot and Masonic. There is a traffic light and jughandle at that entrance. Two additional entrances to the mall's parking lot, further away from the Sears' store, also come off of Gratiot. There are three entrances to the Sears' parking lot off of Masonic, a 30-mile-per-hour roadway, none of which are protected by traffic lights, and two off of Beaconsfield, one of which enters on the Sears' lot and another which goes into the mall's lot further north. There are bus stops in the mall's parking lot and another along Gratiot. About 40 percent of drivers heading into the Sears' lot use the first entrance on Gratiot with the balance divided roughly evenly among the other entrances. The mall is surrounded by a public easement, 15 to 20 feet wide and hard surfaced, which is maintained by the city.

Macomb Mall consists of an enclosed structure of approximately 940,000 square feet, surrounded by acres of a parking lot. Sears, the largest store in Macomb Mall, and the mall itself were built and opened for business simultaneously. In addition to Sears, the mall contains 1 or 2 smaller department stores and about 90 specialty shops, occupying leased space. The department stores are at the ends of the mall's streetlike aisles along which are the specialty shops.

The entire mall, including Sears, is open to the public 362 days a year, for substantial portions of each day. Sears' hours are slightly longer than those of the other stores in the mall.

Sears owns and controls the property on which it sits from the mall entrance to the easements around its parking lot. Sears' parking lot holds about 1500 cars and, according to Sears' witnesses, Sears' shoppers tend to be single-item shoppers who park and enter nearest the department in which they intend to shop. Macomb Mall's parking lot holds about 4600 cars. Sears' shoppers are not precluded from parking in the mall's lot and entering the mall through any of its doors. Conversely, customers for other stores may park in Sears' lot and enter through Sears.

About 20 percent of Sears' customers enter that store from the mall. The remainder enter from the sidewalk around Sears through doors into the various departments. These entrances vary from single door width at the automotive department, to double doors into the catalogue, optical/financial, and sporting goods departments, with a four door wide entrance to the women's wear department. The mall entrance

[4] That Mossman took the telephone call from Ziembovic at his office located at some distance from the mall, rather than at the mall as alleged in the complaint, is irrelevant and not a material variance from the pleadings.

is wide enough for several people to enter or leave side by side.

2. No-solicitation rules

As at Oakland Mall, Sears has a no-solicitation rule in effect at Macomb Mall and signs, identical to those at Oakland Mall, are posted at each entrance. At the time of these events, several of the permanent signs may have come down and been replaced by temporary signs in the vestibules. Sears rigidly enforces this rule at Macomb Mall, not even allowing Christmas bell ringers on its property.

Macomb Mall also has a policy with respect to nontenant activities, including solicitations, petitioning, and vending. That policy requires that an interested organization first complete an application describing the activity, sign both a ''Hold Harmless & Indemnification Agreement'' and an agreement to abide by the rules established for such activities, and provide a certificate of insurance establishing that Macomb Mall has been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. Similar insurance is required of the mall tenants. After meeting these requirements, numerous organizations have held shows, exhibits, and fundraisers in the mall.

Sheldon Peven, Macomb Mall's insurance consultant, reviews the mall's insurance requirements and the policies provided under it. He testified that he deems this to be an advisable practice for the mall, one which the mall has historically required, in order to protect the mall and its tenants from liability arising from accidents and altercations. In addition to securing insurance coverage, Macomb Mall uses the application procedure to schedule events and avoid conflicts. The policy has uniformly been required of all outside groups, including those making charitable solicitations or educational presentations.

3. Handbilling at Sears at Macomb Mall

The Union began handbilling Sears at Macomb Mall on August 9. The handbilling continued on the morning of August 10 with handbillers at the interior mall entrance and at exterior entrances on all three sides of the Sears' store. The handbilling at the customer service entrance, one of the busier doors, was observed by the store's manager, Gary Crawford, who directed Margaret Lauretti, the loss prevention supervisor, to exclude them. She told the two men at that door that they were on private property and would have to leave or the police would be called. They left. However, when similar instructions were given to handbillers at other doors, they refused to leave. Sears called the local police and the handbillers left when ordered to do so under threat of arrest. The Union returned about September 7 and resumed handbilling at the mall entrance and at several of the exterior doors. Once again, Sears' supervisors or managers ordered them to vacate Sears' property and called the police when the handbillers refused. The police, threatening arrest, ordered them to leave and the Union complied.

When ordered by the police to leave Sears' property, Gregory Lowran, the Union's business representative, asked where their activity would be permissible. He was told that they could go to the easements around the property. However, the police told him, if the handbillers went off the easement and handbilled in the street, they would be arrested for obstructing traffic. The Union left and has not attempted to handbill at Sears in Macomb Mall since early September.

4. Handbilling in Macomb Mall

As noted above, the Union commenced its handbilling activity at the Sears' store in Macomb Mall on August 9, with several handbillers on mall property at the Sears' entrance and others on Sears' property outside the mall. During the course of that activity, the handbillers who had been at the mall entrance were told to stop their distribution. They called Lowran and reported that someone from the mall had said they needed permission in order to continue. He directed them to disregard the order and continue, which they did for a brief period longer, until they ran out of bills.

On hearing from the handbillers, Loran called Macomb Mall's office. Speaking with Janet Lewis, secretary to Mall Manager Nancy Lamphear, he asked whether permission was required to handbill in Macomb Mall. According to Lowran, she replied that he would have to send Lamphear a letter stating the Union's request. On August 10, Arthur Brown, one of the former Ryder employees, delivered a letter to the office, ''requesting permission to handbill all the Sears' entrances at the Macomb Mall.'' When he delivered it, he was told about an insurance requirement.[5] Brown called Lowran and related what he had been told about insurance.

Lowran immediately called the mall's office and was told by Lewis that the Union could not handbill until it completed the application form and gave the mall proof of a $1 million insurance policy. He asked to speak to someone higher up and was referred to Joe Thomas, property manager for Shostak Bros., managing agent for Macomb Mall. Lowran next received a call from his handbillers reporting that the police had come, ordered them off the property, and prohibited them from placing their bills on cars in the parking lot. Lowran told them to comply with the police orders in order to avoid arrest.

Lowran called Thomas on August 10 or 11, asserted the Union's right to handbill, and questioned the insurance requirement. Thomas explained that everyone coming into the mall to sell, display, or solicit was required to complete the application form and have a $1 million liability policy. If they fulfilled these conditions, Thomas stated, the Union could distribute its handbills and place them on cars in the parking lot. On August 11, Lowran received a set of Macomb Mall's application forms. At some point, he also received a small sheet of blue paper, detailing the insurance requirements at levels one-half of what he had been told was required.[6]

Lowran made several calls to union officers and to the Union's insurance representative and, he testified, was unable to secure the necessary insurance. He was told that no such

[5] It is immaterial whether he delivered the envelope to Nancy Lamphear, as he testified he had done, or to Janet Lewis or Debbie Eavers as Lamphear's testimony would indicate. All three had authority to order the Union not to handbill without completing the mall's application requirements.

[6] Macomb Mall's representatives testified that, while the written instructions only required a $500,000 liability policy, it was their practice to orally state that $1 million coverage was required.

insurance was available.[7] On August 26, he submitted the completed application, together with the signed regulations and the ''Hold Harmless Agreement.'' He did not submit proof of the required insurance.

The Union's last attempt to handbill at Macomb Mall occurred on approximately September 7. Ryder employee Brown handbilled in the mall at the Sears' entrance for about 1-1/2 hours. He left when the police came. On that same date, Lowran was ordered to stop handbilling by a Macomb Mall security officer and by personnel in the mall's office. He was also given another application package and it was made clear to him that the Union could handbill and place the handbills on cars in the parking lot if the entire application procedure, including the insurance requirement, was satisfied.

#### 5. The Union's alternatives

According to Gary Crawford, Sears' store manager at Macomb Mall, most Sears' shoppers enter the store to purchase a single item, parking closest to the department carrying that item. Moreover, he testified, 40 percent of Sears' shoppers at Macomb Mall enter the parking lot at the first driveway off of Gratiot where both north- and southbound cars can turn in. Crawford also testified that he has observed charitable solicitations being made from the easement around the parking lots. Thus, he contended that easement afforded ample opportunity for the Union to distribute its handbill without entering on Sears' property.

The Union did not attempt to handbill from the easement or the medians in the abutting roads. It did not do so, Lowran testified, because the police had threatened the handbillers with arrest if they went into the roadways and obstructed traffic. Additionally, he noted, a handbiller standing on the easement would be on the passenger side of any passing car, the traffic was heavy and moved at high speeds, and a car containing a Sears' customer could not be distinguished from one containing shoppers destined for other stores.

### D. *Analysis*

#### 1. The analytical framework

In *Fairmont Hotel*, 282 NLRB 139 (1986), the Board had announced a new test for access cases. Pursuant to that test, the strength of the Section 7 rights being claimed would be weighed against the strength of the property right involved, with the stronger right prevailing. Only where those rights were relativeiy equal in strength would the availability of alternative means of communication become determinative. In *Jean Country*, 291 NLRB 11 (1988), the Board considered relevant precedent and its experience under *Fairmont* and held that the ''availability of reasonable alternative means of communication must be considered in every access case, in conjunction with a consideration of the Section 7 rights and the property rights involved.'' *Target Stores*, 292 NLRB 933, 934 (1989).

In *Jean Country*, the Board noted that its essential concern in all access cases will be ''the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted.'' *Mountain Country Food Store*, 292 NLRB 967 at 967 (1988). It identified numerous factors relevant to assessing the relative weights of the competing rights and the availability of alternative means.

Thus, the Board noted that included among the factors relevant to weighing the property rights are ''the use to which the property is put, the restrictions, if any imposed on public access to the property, and the property's relative size and openness.'' ''[D]enial of access,'' the Board stated, ''will more likely be found unlawful when property is open to the general public than when a more private character has been maintained.''

Relevant to consideration of the Section 7 right, the Board held, is ''the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning Section 7 rights are directed, and the manner in which the activity related to that right is carried out.''

Finally, the Board noted that ''the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and most significantly, the extent to which exclusive use of nontrespassory alternatives would dilute the effectiveness of the message'' are among the factors to be considered in evaluating alternative means.

These factors are, to a certain extent, interdependent, and a given factor may be relevant to more than one inquiry. ''[T]here is no simple formula . . . .'' *Jean Country*, supra, 291 NLRB at 14.

#### 2. The property rights

##### a. *Sears*

Sears, as owner of its own properties, unquestionably has legitimate property interests. In furtherance of those interests, the properties are posted against solicitations and distributions and Sears enforces those restrictions as against virtually all those who would engage in such activities. The nondiscriminatory enforcement of such rules tends to make Sears' property interests more substantial that those of a similarly situated retail enterprise without any restrictions. *Target Stores*, supra.

However, since Sears maintains large stores surrounded by sidewalks for the use of the general public, invites the general public to enter on its property through any of a number of adequately sized entrances, whether to shop, browse the merchandise, or simply to pass through on the way to other stores, and permits anyone to drive through its ample, open parking lots from multiple unrestricted entrances and park thereon, whether shopping at Sears or elsewhere in the malls,

[7] Peven, the mall's insurance consultant, testified in response to the administrative law judge's questions that a liability policy such as the Union might carry would generally cover its entire operation. The Union should have been able to get the necessary rider or certificate covering a third party for a fairly nominal cost, at least if the activity was to last for only a few days. Most insurance agents, he said, would be aware of the procedure. It was conceivable, he acknowledged, that the Union's policy might not provide such coverage. In that case, a separate policy would be more expensive. No other witnesses with any experience in the insurance industry were proffered by any of the parties.

its property interests are less substantial than those of an employer in a more private nonretail setting. *Target Stores*, supra. Cf. *L & L Shop Rite*, 285 NLRB 1036 (1987), where a supermarket in a small shopping center, sharing the parking lot with several other stores, but imposing no restrictions on access to the parking lot or the sidewalk in front of its store, was held to have only a limited, relatively modest, property right. But cf. *Sisters Chicken & Biscuits*, 285 NLRB 796 (1987), where the owner of a freestanding single facility with its own parking lot provided for the convenience of its customers was held to have a substantial private property interest.

b. *Oakland Mall*

Like Sears, Oakland Mall has established a legitimate property interest in the mall and surrounding parking lot. Its property right, however, is a relatively weak one. Thus, the mall covers a large area, consists of approximately 140 stores, and is open to the public 7 days per week for substantial portions of each day. With wide, tree- and bench-lined walkways, numerous entrances, ample parking, and other public access, it is intended to attract and attracts large numbers of people each day; indeed, the success of the retail enterprises to whom it leases space is dependent on its doing so. There is no evidence that Oakland Mall imposes restrictions on the use of the property; no reference was made, either when the Union sought permission to handbill or at the hearing, to any no-solicitation or no-distribution rules. As in *Jean Country*, the mall has intentionally been given certain quasi-public characteristics which ''tend to lessen the private nature of the property, because it is apparent that the public is extended a broad invitation to come on the property, and not necessarily with the specific purpose of purchasing a particular product or service.''

c. *Macomb Mall*

The only distinctions between Macomb and Oakland Malls are Macomb Mall's nondiscriminatory maintenance of a requirement that exhibitors, solicitors, and the like complete an application, sign ''Hold Harmless'' agreements, and provide proof of substantial insurance designating the mall as an additional insured party, and the evidence that Macomb Mall has permitted a wide range of outside nonretail activities to occur in the mall. In all these characteristics, Macomb Mall operates in essentially the same manner as Brook Shopping Center, the mall in which Jean Country was located. The Board found Brook to have only a weak property right; Macomb Mall's is no stronger.

3. The Section 7 right

The Union's handbilling was directed at Sears' customers, not its employees, and had no organizational objectives. Neither did it purport to protest any unfair labor practice by Sears or to apply economic pressure on Sears or any other employer with whom it was engaged in ongoing collective bargaining. It was not, therefore, primary union activity constituting a core Section 7 right. See *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *W. S. Butterfield Theatres*, 292 NLRB 30, 30–31 (1988).

On the other hand, the handbilling was directed at securing the reemployment of the Union's members and the handbilling sought to apply pressure at the fulcrum of the dispute, Sears, whose actions, directly or indirectly, brought about their unemployment and could similarly bring about their reemployment. It was somewhat akin to the ''struck product'' consumer handbilling recognized by the Supreme Court in *NLRB v. Fruit Packers Local 760*, 377 U.S. 58 (1964), as a protected activity and found by the Board in *Mountain Country Food Store*, supra, to be a relatively strong Section 7 right. At the very least, such handbilling stands on the same footing as the area standards activity involved in both *Jean Country* and *Target Stores*, not at the stronger end of the ''spectrum'' of Section 7 rights, but most certainly valid Section 7 rights, worthy of protection against substantial impairment. Moreover, those members whose jobs were at stake personally participated in the handbilling and the handbillers were limited in number, peaceful, and unobstructive. By handbilling at the entrances to Sears, they remained in close proximity to Sears' customers so that it can be said that ''the Union could not have more carefully restricted its activities to reach the intended audience while not disturbing others.'' *Target Stores*, supra at 935. Nothing the handbillers did diminished the strength of their Section 7 right.

4. The Union's alternatives

Turning finally to the third factor in the equation, I must conclude that, contrary to the contentions of Respondent Sears, the Union had no reasonable alternatives, under the circumstances to conducting its handbilling at the Sears' entrances, on Sears' property or on the property of Macomb Mall, immediately adjacent to the Sears' entrance.

Sears suggests that the Union could have handbilled from the public easements around its properties, particularly at the driveway entrances. Had they done so with any hope of being at all effective, the handbillers would have been required to step into the street to deliver their message to the drivers' sides of the cars and would simultaneously have required most of those drivers to at least slow down to receive the handbill. Given the prevailing speed limits and the amount of traffic the surrounding roads carry, this would have posed both a serious safety hazard at virtually all of the points where the activity would have had to take place and a very real risk of arrest for obstruction of traffic, as the Union was expressly warned by the police at each mall.

Had the handbillers refrained from stepping into the streets, they would have been unable to reach most cars, at least from the public easements, as they would have been standing on the passenger side of any passing vehicle. They would also have been unable to explain their situation to potential Sears' shoppers, rendering their message less effective. In this regard, I note that the Union's message was fairly detailed, certainly more complex than ''nonunion'' or ''on strike,'' and required some explication by the handbillers. Moreover, even assuming that the message was readily understandable by reading the handbill, the Union could not have communicated it to passing motorists from a picket sign placed on the periphery of the property without substantial fear that it would have been subjected to unfair labor practice charges.

Sears' shoppers may, indeed, be single-item shoppers and 65 percent of them at Oakland Mall may enter through entrances numbers one and two, off of 14 Mile and John R Roads, respectively. However, entrance number one is the property line between Sears and the Oakland Mall and clearly would be a main entrance for mall shoppers as well as those destined for Sears. Even if the Union could safely, effectively, and without fear of arrest have handbilled from public property abutting those two entrances (all of which is doubtful), it would have been unable to communicate verbally with the shoppers and would have missed 35 percent of the auto traffic going in to Sears as well as the 20 percent which enters through the mall, substantially diluting its message. It would also have enmeshed a substantial number of mall shoppers in the dispute.

Similarly, had the Union sought to handbill from public property alongside the two busiest entrances to Sears at Macomb Mall, it would have reached, at best, 40 percent of the cars entering the Sears' lots, missing 60 percent plus all those customers (20 percent) who enter from the mall. It would also have been unable to distinguish Sears' shoppers from those going elsewhere in the mall and would necessarily have enmeshed mall shoppers in its dispute.

The Union did not attempt to handbill from the public easements surrounding each of the malls. It was not required to attempt that which simple observation and common sense indicates would be, as I find, both fruitless and dangerous. *Emery Realty v. NLRB*, 863 F.2d 1259 (6th Cir. 1988).

### E. *Conclusions*

#### 1. Sears

Sears' property interests are not insubstantial; they are less than those of an employer in a more private nonretail setting but somewhat greater than those of a shopping center occupant who has not posted his own property with no-solicitation rules. Here, those interests are balanced against similarly substantial Section 7 rights and the absence of reasonable alternative means for the Union to exercise those protected rights. Applying the *Jean Country* analysis, I must conclude that those property interests are required to yield to the extent necessary to permit the Union's peaceful, limited, and unobstructive handbilling at the mall and other store entrances. Sears' refusal to permit such handbilling on its property, I find, violates Section 8(a)(1) of the Act.

#### 2. Oakland Mall

Oakland Mall contends that, even if I find (as I have) that it refused to allow the Union to handbill on its property, no violation can be found inasmuch as the Union had a reasonable alternative for effective communication, handbilling within the bounds of Sears' property both at the mall entrance and outside Sears' store.

I would find this argument persuasive if the Sears' property was clearly marked instead of being held out as mall property, if the mall's representatives had made clear where that property line was, and if the Union had not been threatened with arrest for handbilling on Sears' property. The key under *Jean Country* is the ''availability of a reasonably effective alternative means'' of communication (291 NLRB at 14). Given the lack of a clear delineation of property lines and Sears' refusal, albeit unlawful, to allow handbilling on its property, I must find that, at that time, the Union had no reasonably effective alternative avenues of communication to the Sears' customers other than handbilling on Oakland Mall's property in the vicinity of the mall entrance to Sears.[8] Accordingly, I find that by rejecting the Union's request for permission to handbill at the Sears' entrance in the mall, Respondent Oakland Mall violated Section 8(a)(1) of the Act.

Oakland Mall also rejected, or at least strongly discouraged, the Union from placing handbills on the windshields of cars on its parking lots. Given that these lots were not adjacent to the Sears' store, that far more mall customers than Sears' shoppers would be the recipients of such a distribution, that the ''Don't Shop at Sears'' message would reach shoppers on their way out, when it would be less effective than if it had been received before the shopping was completed, and given the anticipatable littering problem, I do not find this prohibition to have been unlawful.

#### 3. Macomb Mall

Respondent Macomb Mall asserts that it did not prohibit the Union from handbilling. Rather, it merely insisted that before the Union do so, it meet the standards nondiscriminatorily applied to all nontenant events. This, it argues, it had a right to do in the interests of providing a shopping environment conducive to shopper interest and comfort and protecting third parties from potential injury by outside entities.

The General Counsel points out that, as noted above, Brook Shopping Center in which Jean Country was located had a similar requirement. In the context of seeking to limit union picketing in the event that it was to be determined that Jean Country and Brook had committed unfair labor practices by prohibiting the union's picketing in the mall, Jean Country requested that the union be required to post maintenance and insurance bonds before resuming picketing. The Board denied Jean Country's request, stating:

> Respondent Jean Country additionally requested that the Union be required to post maintenance and liability insurance bonds prior to picketing in the mall, implicitly relating the conduct of the Union's picketing to the conduct of the annual charity and arts and crafts fairs . . . . We see a significant difference between the fairs, where between 40 and 75 tables are set up for the sale of merchandise and raffle tickets, and the limited picketing in this case. We also note the absence of any reasonable supporting rationale offered by the Respondent for restraining Sec. 7 activity in this way, and we can conceive of none. Accordingly, we deny the Respondent's request. [291 NLRB at 19 fn. 21.]

This conclusion is at least equally applicable to the instant situation where the Union sought to engage in handbilling, a less confrontational activity than picketing. I note, in this regard, that most of the events held at the mall during 1988 and subjected to the insurance requirement involved shows,

[8] If my Order with respect to Respondent Sears is ultimately upheld and compliance therewith is secured, or if Sears voluntarily concedes the Union's right to handbill on its property, the fact that Sears owns 12 feet of property into the mall from which the handbilling could take place might obviate Oakland Mall's obligation to permit the Union's presence on its property.

displays, information centers, merchandise sales, and fund solicitations, all appearing to involve more people, blocking of the aisles, and equipment than the Union's handbilling.

Similarly, I note that while Macomb Mall's insurance consultant recommended and approved of the mall's requirements, no substantial justification was offered. The possibility someone might trip over a handbiller or become so incensed that he or she would start a fight is remote, not significantly greater than the risk of similar incidents occurring between any two shoppers in the mall. Neither such remote risks nor the mall's desire to create a serene setting for the mall tenants' commercial enterprises warrants such a burden[9] being imposed on the exercise of Section 7 rights, particularly in light of Macomb Mall's relatively weak property interest. Accordingly, I find that by prohibiting the Union from handbilling at the Sears' entrance in Macomb Mall unless it adduced proof of insurance coverage naming Macomb Mall as an insured party, Macomb Mall has violated Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. By demanding that the Union cease or refrain from engaging in protected handbilling activity on their properties, and by threatening it with arrest if the handbilling activities continued, Respondents Sears and Oakland Mall have violated Section 8(a)(1) of the Act.

2. By imposing unreasonable restrictions on the Union's handbilling activities on its property, Respondent Macomb Mall has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondents have not violated the Act in any other manner alleged in the complaints.

## REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

## ORDER

The Respondents, Sears, Roebuck and Co., Troy and Roseville, Michigan, Macomb Mall Associates, a Limited Partnership, Roseville, Michigan, and Oakland Mall, Ltd., Troy, Michigan, their officers, agents, representatives, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully handilling at the entrances to the Sears, Roebuck and Co. stores in the Oakland Mall and Macomb Mall, in Troy and Roseville, Michigan, respectively, or imposing unreasonable burdens on the Union's exercise of its right to engage in peaceful handbilling at those locations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respondent Sears, Roebuck and Co. shall post at its stores in Oakland Mall and Macomb Mall copies of the attached notice marked ''Appendix A.''[11] Respondent Oakland Mall shall post at its office in Oakland Mall copies of the attached notice marked ''Appendix B.''[12] Respondent Macomb Mall shall post at its office in Macomb Mall copies of the notice marked ''Appendix C.''[13] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by each Respondent's authorized representative, shall be posted by each Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] I am satisfied that the Union made an adequate effort to comply with the mall's insurance requirement and found it burdensome. I do not believe that it can be required to engage in lengthy, fruitless, and/or expensive searches for the coverage demanded as a condition of exercising statutory rights.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[12] See fn. 11, above.

[13] See fn. 11, above.

## APPENDIX A

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully engaging in protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store, by threatening them with arrest if they remain on the property of Sears, Roebuck and Co., or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SEARS, ROEBUCK AND CO.

## APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, of America, AFL–CIO from engaging in peaceful protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store in Oakland Mall, by threatening them with arrest if they remain on the property of Oakland Mall, Ltd. or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OAKLAND MALL, LTD.

## APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from peacefully engaging in the protected concerted activity of distributing handbills at the mall entrance to the Sears, Roebuck and Co. store by demanding proof of liability insurance or by insisting that they leave the premises if they do not provide proof of such insurance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MACOMB MALL ASSOCIATES, A LIMITED PARTNERSHIP